

STATE OF MICHIGAN
COURT OF APPEALS

DUNHAM LAKE PROPERTY OWNERS
ASSOCIATION and DUNHAM LAKE CIVIC
COMMITTEE,

UNPUBLISHED
June 19, 2003

Plaintiffs-Appellants,

v

RAINER BAETZ and CAROL M. BAETZ,

No. 237047
Livingston Circuit Court
LC No. 99-017167-CZ

Defendants-Appellees.

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right a judgment of no cause of action in this declaratory action to enforce recorded deed restrictions. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendants are the owners of property in “Dunham Lake Estates South” subdivision in Livingston County. The property is subject to deed restrictions that were originally recorded in 1964 and subsequently amended in 1965 and 1966.

The Declaration of Restrictions and Easements, as amended, stated in part:

A. RESIDENTIAL AREA REQUIREMENTS

1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two (2) stories in height and a private garage for not more than three (3) cars.

2. No building shall be erected, placed, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Dunham Lake Civic Committee as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation. . . .

Defendants' lot had a single-family dwelling with an attached garage. The dispute concerns a detached, enclosed structure, which has been characterized as a "building," "a storage building," and an "outbuilding." The structure was constructed of wood, without a cement floor or footings, and was approximately ten feet by twelve feet. It had a window and a double door. The structure was used primarily for storage of lawn equipment. The cost of construction was approximately \$2800. Defendants did not seek approval of the structure by the Civic Committee.

Plaintiffs filed this action seeking a declaration that defendants violated the deed restrictions and an injunction requiring defendants to remove the "outbuilding" from their property. Plaintiffs alleged that the "outbuilding" was not a dwelling or garage and that the deed restrictions did not allow "other outbuildings."

Following a bench trial, the trial court denied plaintiffs' requested relief and granted judgment to defendants. The court's opinion discussed in detail the inconsistencies in plaintiffs' interpretation of the deed restrictions, specifically in regard to the plaintiffs' definition of "building." The court did not expressly find that defendants' structure was a building. Rather, the court concluded that the evidence "justifies the application of the defense of estoppel, waiver, and laches."

This Court reviews equitable actions de novo, but reviews the court's findings of fact for clear error. *Webb v Smith (Aft Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

Plaintiffs argue that although the trial court referred to laches, the court did not analyze that doctrine and the evidence did not support its application. We agree. Laches is an affirmative defense that requires both a delay in instituting an action to enforce the restriction and a showing of prejudice to the party asserting the defense. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 154; 336 NW2d 778 (1983). Here, plaintiffs were aware of the purported violation as early as August 26, 1996, within two weeks after the structure was complete. Plaintiffs granted defendants' request for time to allow them to gather signatures for a petition to amend the restrictions. The deadline for obtaining the signatures, as extended by plaintiffs, was June 30, 1997. Defendants did not obtain the necessary signatures for their petition. In a letter dated July 2, 1998, plaintiffs asked defendants to remove the outbuilding. Defendants did not remove the structure. On April 23, 1999, plaintiffs commenced the instant action. Although the question whether plaintiffs acted with reasonable promptness in instituting the suit after the expiration of the June 30, 1997, deadline is debatable, there was no evidence that defendants were prejudiced by this delay. Absent some prejudice to defendants resulting from the delay, we agree with plaintiffs that the defense of laches was not applicable.

Plaintiffs next argue that the court erred in determining that plaintiffs lost the right to enforce the restrictive covenant through waiver. We agree.

Waiver of restrictions requires a showing that the character of the subdivision has been so altered as to defeat the original purpose of restriction. *O'Connor v Resort Custom Bldrs, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999), citing *Carey v Lauhoff*, 301 Mich 168, 174; 3 NW2d 67 (1942). "There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." *Rofe, supra*, p 155. Here, the trial court found that

plaintiffs had been inconsistent in application of the restrictions and that many structures within the Dunham Lake properties violated the plain language of the deed restrictions. However, defendants did not demonstrate a change in the character of the subdivision, and the trial court did not find that a change in character had occurred. Therefore, the evidence and the court's findings do not support the court's conclusion that the restriction had been waived.

Plaintiffs have not addressed the trial court's determination that they were estopped from enforcing the restrictive covenant. In the context of negative covenants and deed restrictions, the term "estoppel" is often used in conjunction with the analysis of laches and waiver. See e.g., *Bigham v Winnick*, 288 Mich 620, 623; 286 NW 102 (1939); *Carey, supra*, p 174; *Baerlin v Gulf Refining Co*, 356 Mich 532, 534-536; 96 NW2d 806 (1959.) Here, however, the court referred to the elements of equitable estoppel as set forth in *In re Yeager Bridge Co*, 150 Mich App 386, 394; 389 NW2d 99 (1986): "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." (Citations and internal quotation marks omitted.) The court essentially determined that plaintiffs' failure to enforce the deed restriction induced defendants to believe that such structures were permitted and that defendants justifiably relied on and acted on this belief. Defendants would be prejudiced if plaintiffs were allowed to deny the existence of the facts and require removal of their structure. The trial court noted that Michael Wolanin, who testified as plaintiffs' representative, acknowledged that a person looking at the other structures in the neighborhood might reasonably conclude that a structure like defendants' would be permitted. Indeed, Wolanin admitted that defendant's structure would be permissible as constructed if it were *used* as a playhouse, thus reinforcing the reasonableness of defendants' reliance on the *structure* being permissible under the restrictive covenant. Plaintiffs have presented no argument challenging the court's findings concerning justifiable reliance on the part of defendants or the court's conclusion concerning equitable estoppel. Because plaintiffs have failed to address this basis for the court's decision, they are not entitled to reversal of the judgment. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 111; 413 NW2d 744 (1987).

Moreover, we conclude that the judgment in favor of defendants was warranted because plaintiffs failed to establish a violation of the restrictions. Although the trial court did not expressly resolve the dispute between the parties concerning the whether defendants' structure was a "building" as that term is used in the restrictions, we conclude that plaintiffs' failure to establish the claimed violation is an additional basis for affirming the trial court's judgment.

The premise of plaintiffs' request for relief is that the deed restrictions prohibit any "building" other than a single-family dwelling and a garage and that defendants' structure is a prohibited building because it is neither a dwelling nor a garage. Plaintiffs had the burden of proof in establishing a violation of the restriction. *Wilde v Richardson*, 362 Mich 9, 12; 106 NW2d 141 (1960). "The provisions are strictly construed against the would-be enforcer, however, and doubts resolved in favor of the free use of property. Courts will not grant equitable relief unless there is an obvious violation." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997) (citations omitted).

The term "building" is not defined in the restrictions. The absence of a definition in the restrictions does not necessarily lead to the conclusion that the term is ambiguous. *Terrien v*

Zwit, 467 Mich 56, 76; 648 NW2d 602 (2002). Rather, the term is to be interpreted in accordance with its “commonly used meaning.” *Id.*

At trial, plaintiffs’ evidence concerning the meaning of “building,” as interpreted by the Civic Committee was presented by Wolanin, who had been a member of the Dunham Lake Civic Committee for approximately ten years. Wolanin acknowledged that the definition of “building” was “vague.” No Civic Committee procedures, rules, regulations or guidelines governed the determination of what constituted a building. Although the Civic Committee did not have authority to approve a building that was not a dwelling or a garage, the Civic Committee assessed a structure that was not a residence or a garage on an individual basis using a “common sense definition” to decide if it would be deemed in conformance with the restrictions.

However, Wolanin’s testimony did not present a coherent definition of the term “building.”

According to Wolanin, whether a structure was a “building” depended in part on its proximity to the house or garage. Thus, a structure that was pushed up next to the house or garage or attached to the house or garage by latticework, for example, would not be considered a building. According to Wolanin, if defendants’ structure were near the house, no one “would have a problem with that.”

According to Wolanin, whether a structure was a “building” depended in part on whether it was cosmetically “unitized” and in harmony with the house. Thus, an enclosed structure built on a deck four feet from the home was not a violation of the restrictions because it was “unitized” with the deck and the house, regardless of its use. The same structure placed thirty to fifty feet into the yard would be “a real problem” for Wolanin.

According to Wolanin, regardless of proximity to the house and harmony with the dwelling, a structure used as a playhouse is not a “building.” Playhouses were “outside the scope” of the restrictions. However, if the same structure is used for storage, it is a building. According to Wolanin, if defendants’ structure had been used for a playhouse, it would not have been deemed to violate the restriction. Defendants’ structure was deemed in violation of the restrictions not because of the structure itself, but because of what defendants put in it.

According to Wolanin, the deed restrictions were “getting at” metal or wooden storage buildings. However, he acknowledged that two metal storage structures had previously been approved by the Civic Committee.

Plaintiffs’ theory was that defendants’ structure violated the restrictions because it was a “building” other than a dwelling or a garage. However, rather than establishing a commonly understood meaning of the term “building,” plaintiffs showed that the meaning of the term was uncertain and interpreted at the whim of the Civic Committee members.

Moreover, plaintiffs’ position that the intent of the restrictions was to preclude “outbuildings,” such as barns and storage structures, is undermined by a separate restriction referring to outbuildings.

A. RESIDENTIAL AREA REQUIREMENTS

* * *

9. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence, either temporarily or permanently.

The deed restrictions are grounded in contract, and in an action to enforce deed restrictions, the intent of the drafter controls.¹ *Stuart, supra*, p 210. As in other cases involving interpretation of contracts, this Court considers the instrument as a whole, and all parts are to be harmonized so far as reasonably possible. *Rofe, supra*, p 157; *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 110; 77 NW2d 384 (1956). “Every word must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.” *Id.* (Citations and internal quotation marks omitted.)

In this case, the provision in the deed restrictions prohibiting use of an “outbuilding” as a residence militates against plaintiffs’ position that the restrictions prohibited “outbuildings” in all circumstances. A prohibition against use of a barn or “other outbuilding” as a residence is mere surplusage if these structures may not be “erected, altered, placed or permitted to remain on any lot” pursuant to paragraph 1 of the Residential Area Requirements. Instead, the prohibition on using a barn or “other outbuilding” as a residence implies that the listed structures are permitted when they are not used as a residence. The inclusion of this provision suggests that the drafter drew a distinction between “buildings” and “outbuildings,” and the drafter’s intent in limiting “buildings” to a house and a garage was not to ban outbuildings, such as defendants’ structure.

In summary, plaintiffs bore the burden of establishing an obvious violation of the restrictions. *Wilde, supra*, p 12; *Stuart, supra*, p 210. Construing the restriction against plaintiffs and resolving doubt in favor of the free use of the property, we conclude that plaintiffs failed to sustain their burden of establishing that defendants’ structure was a “building” in violation of the restrictions. *Id.* Thus, we affirm judgment for defendants because plaintiffs failed to establish that defendants’ structure violated the restriction and because plaintiffs failed to challenge the court’s findings and conclusion concerning the application of equitable estoppel.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray

¹ Because the intent of the drafter concerning the meaning of the restrictions is controlling, we do not agree with plaintiffs’ contention that defendant Rainer Baetz’ opinion that the structure was a building precluded defendants from maintaining that the structure was not a “building” as that term was used in the deed restrictions.